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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Length limitation allows only brief rebuttals of some of the numerous fallacious arguments set forth in the brief in opposition of the defendant-respondent Metropolitan Life Insurance Company (Metropolitan).

The brief in opposition pleads **res judicata** based on a case in which the class action settlement judge violated the Rules of Decision Act, 28 U.S.C. §1652; the Rules Enabling Act, 28 U.S.C. §2072; Federal Rule of Procedure 23; and the Fifth Amendment of the United States Constitution.

In this same case, the decisions of both the United States District Court in Tampa, Florida (the Tampa court) and the United States Court of Appeals for the Eleventh Circuit (the Eleventh Circuit) are in profound conflict with this Court's very recent decision in the case of **Amchem Products, Inc. v Windsor**, 1997 WL 345149 (U.S.), 96-270, June 25, 1997.

The truth is that petitioners' claims based on Metropolitan's violations of the Pennsylvania Insurance Company Act of 1921, the Pennsylvania Unfair Trade Practices and Consumer Protection Act,

the Pennsylvania Unfair Insurance Practices Act, and the Pennsylvania Bad Faith Insurance Statute, have never been litigated, neither in the Federal courts of Florida and Pennsylvania nor in the state courts of Pennsylvania, thanks to the maneuvering of Metropolitan.

Yet, the brief in opposition asserts at page 13 that "the District Court's transfer orders were routine exercises of discretion that raise no substantial legal issues and impair no substantive rights." This seems typical of the indifference being accorded to thousands, perhaps millions, of absentees who are, for instance, being forced to go to a courtroom some 1,000 miles away from where they live in order to litigate their rights.

Once again, on page 13, the brief in opposition states, "petitioners' attempted 'collateral attack' on **Horton** is nothing more than an abusive attempt to relitigate matters already litigated and lost." It becomes necessary to reiterate the truth -petitioners' claims of violations of Pennsylvania laws by illegal marketing of insurance policies in Pennsylvania have **never** been litigated **anywhere**.

GRANTING OF THE MOTIONS TO TRANSFER WAS AN UNCONSTITUTIONAL ABUSE OF CIRCUMSCRIBED DISCRETION

The brief in opposition plays games with the wording of 28 U.S.C. §1404(a), which provides that a United States District Court "for the convenience of parties and witnesses, in the interest of justice, may transfer any civil action to any other district or division where it might have been brought." (Emphasis supplied.)

It must be noted that the overriding criterion is "for the convenience of parties and witnesses." It is not for the convenience of Federal courts which do not want the burden of resolving complex issues, or who believe some other court might have superior expertise. Such unauthorized criteria are no where listed in §1404(a).

At page 14 of the brief in opposition, it is stated:

> Due process requires only an 'opportunity to be heard,' e.g. Phillips Petroleum Co. v Shutts, 479 U.S. 747, 812 (1985) -- not an opportunity to forum shop.

To equate Pennsylvania citizens suing in Pennsylvania courts for violations of Pennsylvania laws with forum shopping can

only be characterized as misrepresentational audacity.

It was Metropolitan that did the forum shopping by filing the motions to transfer. Such filings reflect an understandable distaste for trying to defend in Pennsylvania courts violations of Pennsylvania laws.

The assertion on page 16 that: "the transfer orders do not impair their alleged right to litigate the merits of their 'collateral attack'" is preposterous. The transfer orders will result in having the collateral attack adjudicated by the same class action settlement judge who violated the Rules of Decision Act, the Rules Enabling Act, and F.R.C.P. 23 in ruling that the Coulters are members of the **Horton** settlement class. It would require superhuman objectivity for the class action settlement judge to do other than reaffirm himself.

Footnote 4 on page 15 of the brief in opposition asserts that petitioners have misread the case of **In Re Real Estate Title & Settlement Services Antitrust Litigation**, 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989). It is Metropolitan that has misread the case and twisted its plain language, which says at 869

F2d at 769:

> An absent plaintiff is not subject to the burdens of distant forum litigation (thereby creating a violation of that individual's due process rights) when it is based on a class action settlement, so long as it can challenge the adequacy of representation in the forum of its choice.

It is impossible to misread that plain language. If there is a due process right to challenge the adequacy of representation in the forum of the absentee's choice, then the brief in opposition is absolutely wrong when it asserts on page 14 that the due process clause does not guarantee petitioners an unrestricted choice of venue for a collateral attack.

It must be pointed out that the petitioners are not seeking an "unrestricted choice of venue;" all they are asking is a Pennsylvania forum for cases involving Pennsylvania parties, Pennsylvania witnesses and violations of Pennsylvania laws.

For Metropolitan to claim that a statute which authorizes transfers for the "convenience of parties and witnesses" overrides this constitutional right is not plausible.

On the same page 14, Metropolitan misdescribed the

transfer statute, 28 U.S.C. §1404 (a) as being "authority to promote the interest of justice, convenience, judicial economy, and respect for the rulings of a court of coordinate jurisdiction."

The transfer statute does not mention "judicial economy," and does not mention "respect for the rulings of a court of coordinate jurisdiction." Such language cannot be legitimately used to determine the scope of authority granted by 28 U.S.C. 1404 (a). This is where the courts below went astray.

The only specifics mentioned in the statutory language is "for the convenience of parties and witnesses ... " The transfers of the instant cases were certainly not for the convenience of the witnesses who would have to travel more than 1,000 miles to appear in the Tampa courtroom. Nor were they for the convenience of the plaintiffs who would be forced to litigate their rights in a courtroom more than 1,000 miles away from where they live. Plaintiffs' due process of law rights have been severely abused, and, despite Metropolitan's denial, petitioners' cases present an important question of law warranting this Court's review.

After belittling petitioners' due process of law rights not to

have their cases transferred to a far-distant forum, the brief in opposition on page 16 turns to the McCarran-Ferguson Act, 15 U.S.C. §1011, which mandates the application of state laws to the insurance business.

The brief in opposition does not deny this, but apparently maintains that Pennsylvania law can be applied just as well by a Tampa, Florida court as in a Pennsylvania court. This is sterile reasoning that totally ignores the interest of justice.

The brief in opposition fails to grasp the fact that the courts below, in considering the motions to transfer, failed to take into account that the law of the transferor forum would have to be applied in any transferee forum. Van Dusen v Barrack, 376 U.S. 612 (1964). Thus, their granting of the motions to transfer by the courts below cannot be intellectually or legally sustained.

At page 27, the brief in opposition belittles the significance of this Court's decision in Amchem Products Inc. v Windsor, (No. 96-270, 1997 U.S. LEXIS 4032 June 25, 1997). All the brief in opposition says about the holding in that landmark case is:

As this Court confirmed in Windsor, the Horton

> court was not required to ignore the proposed settlement in considering whether to certify the class under Rule 23 (b)(3), 1997 U.S. LEXIS 4032.

Actually, this Court's decision in the **Amchem Products** case totally destroyed the ostensible legal foundations of the Eleventh Circuit's decision in the **Horton** case and revealed that the class action settlement judge had failed to apply the due process safeguards which FRCP 23 was designed to protect.

Two of the major holdings in the **Amchem Products** case were that Rule 23's criteria should be applied with undiluted strength in class action settlements, and that constitutional limits on choice of state law apply in nationwide class action settlements. The class action settlement judge in the **Horton** case specifically and avowedly violated both of these principles in rejecting the Coulters' motions to have Pennsylvania law applied to their claims by being separated from the **Horton** settlement class either through severance or creation of a subclass.

There is a self-contradictory character to the argumentation contained in the brief in opposition.

Subsection III.A. on page 20, argues that "the Horton Judgment is not properly before this Court."

Subsection III.B. on the next page argues that "Res Judicata [Effect of the Horton Judgment] Precludes Petitioners' Attack ..."

Subsection III.D. on page 27, argues that "Petitioners' Other Attacks on the Horton Settlement Are Also Baseless."

Actually, the correct statement of the law regarding the binding effect on unnamed plaintiffs in class action settlements is found in Newberg on Class Actions, Chapter 9, §9.26 on page 9.72:

> A brief analysis, however, reveals that an injunction will not lie against absent members to enjoin other litigation except to the extent that the court has and obtains personal jurisdiction over specific class members by individual service of process.

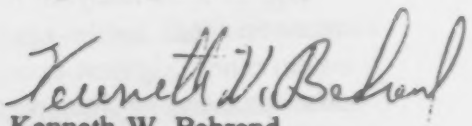
Contrary to this rule of law, the class action settlement judge issued a nationwide injunction purportedly against lawsuits by absent parties. Since there was no individual service of process, this gesture must have been made only for its in terrorem effect.

CONCLUSION

The brief in opposition does not contain any valid arguments that should prevail against the fact that thousands perhaps millions of absentees have wrongfully been deprived of their due process rights by Federal courts making rulings in conflict with the holdings of this Court in the **Amchem Products** case.

The instant cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to proceed with consideration of petitioners' complaints.

Respectfully submitted,



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